

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

June 3, 1998

In Reply Refer to:

1800B3-MFW

Vincent A. Pepper, Esq.
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1776 K Street, N.W., Suite 200
Washington, D.C. 20006

In re: WVRB(FM), Wilmore, Kentucky
Vernon R. Baldwin
File No. BPH-9708191A

Petition for Reconsideration

Dear Mr. Pepper:

This letter refers to (1) the captioned application of Vernon R. Baldwin ("Baldwin") for minor modification of the authorization of station WVRB(FM), Wilmore, Kentucky, by changing channel from Channel 290A (105.(MHz) to Channel 237A (95.3 MHz) pursuant to the Report and Order in MM Docket No.92-159, 8 FCC Rcd 4735 (1993); and (2) the petition for reconsideration of the November 24, 1997 routine staff grant of that application, filed on December 23, 1997 on behalf of WIKI, Inc. ("WIKI"), licensee of Station WIKI(FM), Carrollton, Kentucky.¹ For the reasons set forth below, we dismiss the petition for reconsideration.

On August 18, 1997, Baldwin filed the instant application, proposing to change from Channel 290A to Channel 237A.² No objections were filed, and the staff granted the application on November 24, 1997. WIKI thereafter timely filed the subject petition for reconsideration, arguing that Baldwin's application contravenes 47 C.F.R. §73.203, which does not permit same-class "intermediate frequency"³ channel-changes via an application.⁴

Discussion. Procedural issue. WIKI did not file an objection prior to grant of Baldwin's

¹Baldwin filed an opposition to the petition on January 7, 1998, to which WIKI replied on January 20, 1998.

²The application also proposed to change antenna location and antenna height above average terrain.

³"Intermediate frequency" stations are those FM stations separated by either 53 or 54 channels.

⁴Section 73.203(b) states, in pertinent part, that "[a]pplications for the modification of an existing FM broadcast station may propose a lower or higher class adjacent, intermediate frequency or co-channel, or a same class adjacent channel."

application. Therefore, under 47 C.F.R. §1.106(b)(1), it must, inter alia, demonstrate how its interests were adversely affected by the grant and "show good reason why it was not possible for [it] to participate in the earlier stages of the proceeding." In this case, WIKI claims that it did not file an objection because, during the pendency of the application, it was involved in negotiations with Baldwin which would have enabled both stations to maximize their facilities.⁵ While the negotiations were ongoing, WIKI filed no objection. However, Baldwin ceased negotiations and refused to return several phone calls from WIKI, who states that "no sooner did Petitioner realize that the negotiations had fallen apart, than the FCC granted the modification application." Petition, at 4. WIKI states that the public interest requires consideration of its petition, citing several cases in support of that contention.⁶

Here, while WIKI's interests were adversely affected by the grant of Baldwin's application because such grant precludes WIKI from achieving maximum Class A facilities, WIKI has failed to demonstrate that it was not possible to participate earlier. Petitioner's negotiations with Baldwin, however far along they progressed, provide no excuse for inaction, especially in light of the fact that the Commission was not informed of these negotiations despite its policy of entertaining agreements between Class A stations resulting in mutual facilities upgrade applications.⁷ WIKI's petition will therefore be dismissed. Nevertheless, we take this opportunity to clarify 47 C.F.R. §73.203.

Substantive issue. As noted above, Section 73.203 permits applicants proposing to modify an existing FM station to propose "a lower or higher class adjacent, intermediate frequency or co-channel, or a same-class adjacent channel." WIKI argues that what this rule does not expressly permit, it expressly forbids: the quoted language clearly means that an applicant can only propose a higher- or lower-class intermediate frequency channel, not a same-class intermediate frequency channel, as Baldwin proposes here.

While the language of the rule appears to support WIKI's position, we do not believe that such a narrow, restrictive reading of the rule is consistent with the Commission's intent in authorizing "one-step" facilities upgrades such as that proposed by Baldwin here. Section 73.203 was promulgated in the Report and Order in MM Docket No. 92-159, 8 FCC Rcd 4735 (1993), which was designed to eliminate the rule making step for facilities improvements in circumstances where it largely duplicates the application process. That Report and Order contains the following language:

⁵According to WIKI, the grant of Baldwin's application effectively precludes WIKI from increasing to the full 6 kW maximum effective radiated power for Class A stations.

⁶Birmingham Television Corporation, 14 RR 2d 306 (1968); Southwest Broadcasting Co., Inc., 16 RR 2d 963 (1969); Louisiana television Broadcasting Corporation, 16 RR 2d 413 (1969).

⁷See Report and Order in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), 47 C.F.R. §73.213(c)(2).

20. We will generally limit this new process to adjacent- and co-channel upgrades, adjacent- and co-channel equivalent channel changes, and adjacent-channel downgrades as proposed in the [Notice of Proposed Rule Making in MM Docket No.92-159, 7 FCC Rcd 4943 (1992)], with one variation. As suggested by [commenter Bromo Communications, Inc.], we will apply the one-step process to mutually exclusive IF channels consistent with the Commission's Report and Order amending section 1.420(g) which treated IF channels as adjacent channels for upgrade purposes. See Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent Channels, 60 RR 2d 114, 115, n.1 (1986).

8 FCC Rcd at 4740, ¶20. Thus, the Commission stated that IF channels were to be treated as if they were adjacent channels for purposes of the "one-step" rule making proceeding.⁸ To give effect to these statements, then, broadcast applicants must be permitted to propose same-class IF modification applications, just as they are permitted to file same-class adjacent-channel modification applications.

This position is supported by the Note to Section 73.203(b), which begins as follows: "Changes in channel and/or class by application are limited to modifications on first-, second-, and third-adjacent channels, intermediate frequency (IF) channels, and co-channels which require no other changes to the FM Table of Allotments (emphasis supplied)." Read disjunctively, this explanatory note expressly authorizes changes in channel or class to an IF channel. Additionally, as noted in Baldwin's opposition, Note 1 to Section 73.3573 states that "[a]pplications to modify the channel and/or class of an FM broadcast station to an adjacent channel, intermediate frequency (IF) channel, or co-channel shall not require any other amendments to the Table of Allotments." Again, read disjunctively, this note sanctions the filing of applications to modify channel or class by specifying an IF channel.

Finally, we note that WIKI's position would result in an illogical, anomalous reading of Section 73.203(b). As indicated in note 8 above, Section 73.207 of the Rules precludes operation on adjacent or IF channels. The amount of preclusion is based upon the power and height of the stations involved: the greater the station's facilities, the greater must be the distance between that station and stations on adjacent or IF channels. It would make little sense to permit a broadcaster to specify an upgraded IF channel (for example, from Channel 235A to Channel 288C2) with its increased preclusionary effect, while at the same time forbidding that broadcaster to specify a same-class IF channel with an attendant lesser preclusionary effect. While Section 73.203 does not indicate that broadcasters may apply for same-class IF frequencies, we note that the plain meaning of a statute or regulation will not be followed where to do so produces an

⁸The Commission consistently treats IF and adjacent channels similarly under the Rules. This follows from the fact that both adjacent and IF channel stations possess the capacity for destructive interference, and Section 73.207 spacing standards preclude operation of stations on both adjacent and IF channels. See, e.g., 47 C.F.R. §73.207(b), Tables A, B, and C.

absurd result in clear violation of the intent of the drafters. See United States v. American Trucking Associations, 310 U.S. 534 (1940). Here, we believe that, in MM Docket No. 92-159, the Commission clearly intended to permit same-class IF channel-change applications. Accordingly, we reject WIKI's position that Section 73.203 must be read to prohibit the filing of those applications.

Conclusion/order. In light of the above discussion, the petition for reconsideration filed on December 23, 1997 by WIKI, Inc. IS DISMISSED.

Sincerely,

Dennis Williams, Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Dennis F. Begley, Esq.